IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-838

UNION CARBIDE CORPORATION,
CONSUMER PRODUCTS DIVISION,
Petitioner,

v.

WINIFRED S. NANCE,
Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

ROBERT BELTON
Post Office Box 6057
Station B, University Station
Nashville, Tennessee 37235

JONATHAN WALLAS
Suite 730
East Independence Plaza
951 South Independence Blvd.
Charlotte, North Carolina 28202

Attorneys for Respondent

WILSON - EPES PRINTING CO., INC. RE 7-6002 - WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Petitioner raises, in two different formulations, a single question: whether the exemption provided in § 703(h) of Title VII for a bona fide seniority system is applicable as a matter of law to deny a district court the authority under § 703(g) to grant seniority relief from a facially sex-based seniority system that has a continuing adverse effect on the employment opportunities of a protected member after the effective date of the Act?

STATEMENT OF THE CASE

The issues Petitioner Union Carbide presents for review are not raised on the facts of this case therefore

Respondent Nance [1] finds it necessary to make this counter statement.

Nance sued Union Carbide under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, seeking relief from broad sex-based employment practices at Petitioner's Charlotte, North Carolina plant ("Charlotte plant"). Nance filed her complaint as an individual, non-class action in the United States District Court for the Western District of North Carolina, Charlotte Division, on August 12, 1972.

From the early 1940's until approximately two weeks prior to the effective date of Title VII (July 2, 1965), Union Carbide maintained an open and declared policy and practice of segregating its work force on the basis of sex. (A 13-14) Females were hired into, promoted to, and laid off from jobs reserved exclusively for females and were credited with a seniority standing only with respect to these jobs. The same practice was followed with respect to jobs reserved exclusively for males. (A 14) Separate seniority rosters were maintained for males and females.[2] (*Id.*)

Union Carbide seeks to avoid Title VII liability on the basis that gender-based discrimination was not il-

[1] Petitioner herein will be designated as "Union Carbide" and Respondent as "Nance" to conform to the designation of the parties by Petitioner.

[2] Union Carbide asserts that the classifications of jobs as male jobs or female jobs were based on such factors as weight-lifting requirements, state statutory restrictions on the hours of work for females and other hardship factors (Petition at 5); however, long before the effective date of Title VII females in fact worked on jobs reserved exclusively for males. For example, Nance, employed in 1952, worked on a job designated as a male job from January 12, 1953 until March 16, 1953. Appendix filed in the Court of Appeals, Exhibit Volume EII at 413; 423-424. (Hereinafter designated "Record on Appeal, Vol. —— at ——.") Females who were assigned to male jobs could not assert any seniority rights over these jobs to avoid lay-off solely because of Union Carbide's sex-based seniority practices. (A 14)

legal prior to the effective date of the Act. See Petition at 11. The record shows and the district court found that Union Carbide engaged in facially sex-based practices not only prior to the effective date of the Act, but that it continued to engage in active facially sex-based practices for more than four years after the effective date of the Act. (Finding No. 15, A 13) Facially sex-based practices were not eliminated by Union Carbide until November 18, 1969.[3]

The critical factor for work opportunities at the Charlotte plant is an employee's "company service credit." Promotions, demotions, transfers, lay-offs and recalls are governed by "company service credit" and is the operative seniority standard.[4] Company service seniority is calculated by deducting all of the time during which the

[3] Before July 2, 1965, jobs were specifically designated as "male" jobs or "female" jobs. (A 13-14) In June, 1965 jobs were redesignated "male" or "either". Jobs designated as "either" were for the first time opened to both male and female employees; however, jobs designated as "male" were not open to females under any circumstances. (A 19-20) Designations of jobs as "male" were not removed until November 18, 1969. (A 21-22)

Also, Union Carbide is a government contractor subject to Executive Order 11246. This Executive Order was amended in 1967 and discrimination on the basis of sex was added as a prohibited practice by employers doing business with the United States. (A 8 n. 1)

[4] Employee's fringe benefits also are controlled by company service credit. For example, company service determines the number of days for vacation and the amount to be received from the retirement program. Record on Appeal Vol. No. A. II at 441-443. The employee who is forced to take lay-off is automatically paid his accrued vacation time; participation in the savings program comes to an end and accrued principal and interest are paid out; and participation in group life insurance and hospitalization must be converted into an individual policy. An employee who remains in the plant during a reduction in force continues to receive pro-rata contributions to the fringe benefit programs by Union Carbide and his ongoing participation in these programs continues unabated. Record on Appeal, Vol. II at 522-526. *But see Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 766 (1976).

employee is on lay-off from the employee's original hire date.[5] (A 12-13)

The seniority system here was not negotiated through the collective bargaining process because employees at the Charlotte plant are not represented by a labor organization. (A 34)

The obvious effect of the combination of Union Carbide's pre-Act facially sex-based job classifications and seniority rosters and its use of the company service credit seniority practice (as defined above) is that females were promoted, demoted, laid off and recalled on the basis of company service as compared only to other females whereas male employees with less company service and even later original hire dates would not be affected. Thus male employees who continued to work during a reduction in force gained company service credit where females who were laid off suffered a reduction in company service seniority status.[6] (A 14-16)

Nance was hired at the Charlotte plant of Union Carbide on July 8, 1952 at a time when Union Carbide openly engaged in gender based employment practices. As of August 20, 1973, the company service credit seniority standing of Nance was not her original employment date (July 8, 1952) but rather the date of July 21, 1956. Thus between July 8, 1952 and August 20, 1973, more than four years had been deducted from Nance's seniority status solely because of the lay-offs she

[5] Union Carbide asserts that "company service credit" seniority as used at the Charlotte plant is synonymous with the term "plant-wide" seniority. Petition at 4. But it is simply misleading to treat these terms interchangeably because under the traditional notion of "plant-wide" seniority the time spends the employee on lay-off is not deducted from original employment date. *Compare, e.g., United States* v. *Georgia Power Co.*, 474 F.2d 906, 926 (5th Cir. 1973).

[6] The opposite result could and did occur. *But see Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969), *reversing in part*, 272 F. Supp. 332, 344-345 (S.D. Ind. 1967).

had been forced to take both prior to and after the effective date of Title VII.[7] A number of male employees hired after Nance have as their company seniority dates the date of original hire; thus each has a competitive advantage as to seniority for job progression and protection from lay-offs superior to that of Nance.[8] (A 16 and n. 6)

[7] A summary of Nance's lay-offs is as follows:

Hired 7/8/52	Original company service (CS) date of 7/8/52
Laid off 12/13/53	
Recalled 5/2/55	Adjusted CS 11/14/53
Laid off 7/15/55	
Recalled 9/28/55	Adjusted CS 1/25/54
Laid off 2/24/61	
Recalled 8/21/61	Adjusted CS 7/21/54
Laid off 9/28/62	
Recalled 2/11/63	Adjusted CS 12/3/54
Laid off 4/3/64	
Recalled 1/25/65	Adjusted CS 9/25/55
Laid off 1/23/70	
Recalled 7/20/70	Adjusted CS 3/20/56
Laid off 4/18/73	
Recalled 8/20/73	Adjusted CS 7/21/56

See A 15.

[8] Some of the males identified in the record who were hired after Nance but who have a superior seniority status are as follows:

Name	Date Hired	Company Service
George Hall	2/ 6/56	2/ 6/56
Bonner David Twitty	1/11/56	1/11/56
Carroll J. Stokes	1/ 2/56	1/ 2/56
Willard Paige	11/28/55	11/28/55
Hallbrook McCraw	11/14/55	11/14/55
Craig Barbee	10/31/55	10/31/55
Marvin Sutton	10/31/55	10/31/55
Bobby Joe McCorkle	10/31/55	10/31/55
Howard Morris	10/26/55	10/26/55

See A 16 and n. 6.

The district court held that the company service seniority arrangement constitutes a present practice of discrimination under Title VII that adversely affects Nance's status as an employee. (A 40) In order to remedy the discriminatory features of the seniority arrangement, the district court entered a judgment in favor of Nance that required substantial seniority modifications, including the use of original employment date seniority. (A 60)

Union Carbide appealed to the Court of Appeals for the Fourth Circuit. The Court of Appeals, although vacating the judgment in its entirety [9] sustained the ruling of the district court that Nance was entitled to an adjustment in her seniority standing sufficient to eliminate the present and continuing adverse effects of Union Carbide's pre-Act gender based employment practices. The court held that the company service seniority system was not protected under § 703(h). (A 92-93)

REASONS FOR DENYING THE WRIT

I

The Title VII Principles Relied Upon By the Fourth Circuit Are Consistent With Decisions of Other Courts of Appeals

The conflict that Union Carbide alleges to exist between the legal principles relied upon by the Fourth Circuit in ordering an adjustment of Nance's seniority status and the decisions of the Court in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), and the Seventh Circuit in *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (1974), *cert. denied*, 425 U.S. 997 (1976), simply does not exist and crumbles under analysis. A correct factual analysis focusing upon what is and what is not here involved clearly demonstrates that the issues presented by Union Carbide are not raised on the facts of this case.

[9] A comprehensive judgment was entered by the district court in favor of Nance designed to enjoin all of the Title VII violations claimed and proven by Nance. See A 37-46; A 59-67. However, the Court of Appeals limited Nance's entitlement to relief to a consideration of an adjustment of her seniority date and a recognition of her right to back pay, costs and attorneys' fees. Nance filed a Petition for a Writ of Certiorari in this Court on December 16, 1976 seeking review of the limitation on relief imposed by the Court of Appeals. No. 76-824, *Nance* v. *Union Carbide Corp.*

This case, unlike *Franks* v. *Bowman Transportation Co.*, *supra*, does not involve an identifiable applicant for employment who was rejected after the effective date of Title VII because of an impermissible Title VII criteria, *i.e.*, sex.[10] Here, Nance is an employee who was hired by Union Carbide on July 8, 1952 almost twenty years before the effective date of Title VII and whose seniority status has been diminished solely because she is a female.[11] Nor does this case, unlike *Franks*, *supra*, and *Waters* v. *Wisconsin Steel Works*, *supra*, involve the application of a long established *facially neutral* seniority system embodied in a labor contract. Here, Union Carbide's seniority arrangements were *facially sex-based* prior to the effective date of the Act and remained so for more than four years after the effective date. (A 13) Finally, this case does not involve a consideration of a seniority system that is the product of the collective bargaining process. The legislative history on § 703(h), 42 U.S.C. § 2000e-2(h), about bona fide seniority systems was precipitated in substantial part by Congres-

[10] In *Franks*, the Court stated clearly what that case was concerned with:

> This case presents the question whether *identifiable applicants who were denied employment because of race after the effective date of Title VII* of the Civil Rights Act of 1964 . . . , may be awarded seniority status retroactive to the dates of their employment applications.

424 U.S. at 750 (footnote omitted) (emphasis supplied).

[11] See notes 7 and 8, *supra* at 5.

sional concern with the impact of Title VII on facially neutral [12] seniority systems negotiated and hammered out through the collective bargaining process.[13] Here, not only was the seniority system facially biased but the system is solely the product of Union Carbide because employees are not represented by a labor organization. (A 34)

Union Carbide's reliance upon the so-called "fictional seniority" and "last hired, first fired" seniority cases [14] is totally misplaced. These cases are inapposite here because they involve employment situations in which plaintiffs did not have a pre-Act status as employees with defendants. The relevant cases and the line of cases here relied upon by the Court of Appeals [15] involve plaintiffs

[12] "Of course, if the seniority rule is itself discriminatory it would be unlawful under Title VII." 110 Cong. Rec. 7207 (1964).

[13] See pertinent portions of the legislative history cited by this Court in *Franks* v. *Bowman Transportation Co., supra* at 759-760 and notes 15 and 16.

[14] *Waters* v. *Wisconsin Steel Works, supra; Jersey Central Power & Light Co.* v. *Local 327*, 508 F.2d 687 (3rd Cir. 1975), *vacated and remanded*, 425 U.S. 987 (1976); *Watkins* v. *Steelworkers Local 2369*, 516 F.2d 41 (5th Cir. 1975).

[15] * * * The bellwether authority in this area is the oft-cited case of *Quarles* v. *Philip Morris, Incorporated* (E.D. Va. 1968) 279 F. Supp. 505, 517-8. That case held (a) that only a *bona fide* seniority system was protected under the Act, (b) that "one characteristic of a *bona fide* seniority system must be lack of discrimination," and (c) that a seniority system, however neutral facially, is not a *bona fide* seniority system if it "has its genesis in racial [or sex] discrimination," whether pre-Act or post-Act. Accordingly, *Quarles* established that any seniority system which carried over into the post-Act period the effects of a pre-Act discriminatory job assignment policy disadvantaging a black [or a female] in seniority rights was not a *bona fide* seniority system under the Act and had to be adjusted to remedy that disadvantage. *This decision has been consistently followed by this Circuit and its ruling has been adopted in repeated decisions of other Circuits since and has been approved by the legal writers.* It is conceded by the defendant that in the pre-Act period, the jobs in certain departments were reserved exclusively for male employees and that in periods of lay-off only qualified male employees could bid on the jobs in these departments. Such a system obviously gave the male employee a preferred opportunity to protect his "company service" over the female employee. This more extensive opportunity in bidding for vacancies during lay-offs on the part of male employees was a discrimination against female employees, and because that discrimination was carried over in the operation of the post-Act seniority system it tainted such post-Act system. To such extent as the plaintiff was prejudiced thereby in the computation of her "company service" or seniority rights, she is entitled to relief. This the District Court correctly concluded. (A 93-94) (footnotes omitted) (brackets in original) (emphasis supplied).

who have had a pre-Act status and/or often long association as employees with defendants but whose seniority status has been adversely affected in the post-Act period because of the defendants' pre-Act discrimination. The seminal decisions in this well established line of cases are *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) and *Papermakers and Paperworkers Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (*Local 189*). *Quarles* and *Local 189* established the rule that, as to Title VII plaintiffs who have had a pre-Act status as employees, a facially neutral seniority system is not bona fide within the meaning of § 703(h) when it operates to perpetuate into the post-Act period the effects of historical discrimination. Under the theory of *Quarles* and *Local 189*, plaintiffs are entitled to a modification of the seniority rules that will provide an opportunity for them to reach their "rightful place" in the seniority hierarchy as soon as possible as employment opportunities become available in the future. On facts similar to those involved here, the courts of appeals are consistent in the application of the *Quarles* and *Local 189* reasoning.[16]

[16] Second: *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 661-662 (2nd Cir. 1971).

Fourth: *United States* v. *Chesapeake & O. Ry. Co.*, 471 F.2d 582-587 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); *Patter-*

The Court of Appeals for the Seventh Circuit is in full accord in the application of the *Quarles* and *Local 189* rationale to cases similar to the facts presented here. For example, in *Bowe* v. *Colgate-Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973), a case strikingly similar to this case, the Seventh Circuit affirmed the judgment [17] of the lower court after an earlier remand in which pre-Act seniority losses that were the result of sex-based discriminatory practices were restored to a number of female employees under the rightful place theory of relief. Equally important here also is the recognition by the Seventh Circuit of the necessary factual distinction between the so-called "last hired, first fired" cases such as *Waters*, *supra* and the *Quarles* and *Local 189* line of cases. *Evans* v. *United Air Lines, Inc.*, 534 F.2d 1247, 1249 n. 8 (7th Cir. 1975), *cert. granted on other grounds*, 45 U.S.L.W. 3329 (U.S. November 1, 1976) (No. 76-333).

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son v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir.), *cert. denied*, 425 U.S. 935 (1975).

Fifth: *Pettway* v. *American Cast Iron Pipe Co.*, 494 U.S. 211, 248-249 (5th Cir. 1974).

Sixth: *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *pets. for cert. pending*, 44 U.S.L.W. 3094, 3150 (U.S. August 11, 13 and September 12, 1975) (Nos. 75-221, -220, -393).

Seventh: *Bowe* v. *Colgate-Palmolive Co.*, 489 F.2d 896, 900-901 (7th Cir. 1973).

Eighth: *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1346-47 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809 (1975); *United States* v. *St. Louis-San Francisco Ry.*, 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

Ninth: *United States* v. *Navajo Freight Systems*, 525 F.2d 1318 (9th Cir. 1975).

Tenth: *Jones* v. *Lee Way Motor Freight*, 431 F.2d 245 (10th Cir. 1971), *cert. denied*, 401 U.S. 954 (1971).

[17] The judgment of the district court is not officially reported but may be found at 6 BNA FEP Cases 1123. (S.D. Ind. 1972).

II

The Facts and Issue Decided in *Franks* Are Patently Distinguishable From This Case

Union Carbide recognizes, as it must, that the issue presented in its Petition is not the same issue decided by the Court in *Franks* v. *Bowman Transportation*, 424 U.S. 747 (1974). Petition at 14, see n. 10 *supra*. Union Carbide's recognition of this distinction amply demonstrates the absence of a conflict between the instant case and *Franks* and is thus a sufficient basis upon which the Petition should be denied.

Union Carbide's principle reliance upon *Franks*, when stripped of all of its rhetoric, is at bottom the assertion that the discussion of the legislative history of § 703 (h) "requires the conclusion that Section 703(h) protects company service seniority rights that vested prior to the effective date of Title VII." Petition at 19. This assertion is clearly an erroneous reading of *Franks*. What the Court did in fact was to reaffirm a well established rule holding that seniority rights are not vested indefeasible rights but only expectations that may be modified by statutes such as Title VII. *Franks*, *supra* at 778-779.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT BELTON
Post Office Box 6057
Station B, University Station
Nashville, Tennessee 37235

JONATHAN WALLAS
Suite 730
East Independence Plaza
951 South Independence Blvd.
Charlotte, North Carolina 28202
Attorneys for Respondent